

LEAVE IT TO US: EMPLOYER'S GUIDE TO LEAVE LAWS

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I. INTRODUCTION

- A. There are a number of laws that govern when, how much, and what kind of leave an employer is required to given an employee.
- B. It can be difficult to understand which laws apply to your business and when those laws are implicated by an employee's actions.
- C. Characteristics of Leave/Time Off and Questions to Ask Yourself:
 - 1. Paid v. Unpaid
 - a. Do you offer all employees paid leave? If so, do you offer unpaid leave upon the exhaustion of paid leave? If not, do you offer unpaid leave for those employees who are not eligible for paid leave?
 - 2. Legally Required v. Discretionary
 - a. Are you up to date on all legally required leave? Do you offer more than what is required?
 - 3. Earned v. Accrued
 - a. Is the leave earned in one lump-sum on an anniversary? If so, is the anniversary the date of the employee's hire, the first of the calendar year, or some other date applicable to all employees?
 - b. Or is the leave accrued by the employee over time?
 - 4. Use it or Lose it v. Paid Out
 - a. What happens to the leave at the end of the year or separation? Does the employee lose the leave if it is not used? Do you offer to pay for any unused leave?
 - b. Under the Paid Medical Leave Act ("PMLA"), if your policy uses a pro-rata accrual method, then you must permit a carryover of unused benefits of up to 40 hours.
- D. These materials focus on the following:
 - 1. The various types of leave that are required or optional.

2. Recent developments in federal and Michigan leave laws and how these developments may impact your existing policies.
3. Trends we are seeing from employers.

II. THE ALPHABET SOUP

A. Deciphering the Letters:

1. Family Medical Leave Act (“FMLA”)
2. Americans with Disabilities Act of 1990, as Amended (“ADA”)
3. Pregnant Workers’ Fairness Act (“PWFA”)
4. Providing Urgent Maternal Protections for Nursing Mothers (“PUMP Act”)
5. Michigan’s Persons with Disabilities Civil Rights Act (“PWDCRA”)
6. Michigan’s Paid Medical Leave Act (“PMLA”)
7. Paid Time Off (“PTO”), which can include any of the following:
 - a. Vacation days
 - b. Personal time
 - c. Sick/medical leave
 - d. Holidays
 - e. Bereavement leave
 - f. Parental leave
 - g. Jury duty/witness leave
 - h. Caregiver leave
 - i. Voting time off
 - j. Paid leave for school activities

B. Federally Required Leave – FMLA and the ADA

1. There is currently no federal law generally requiring private employers to provide paid sick leave.

2. However, certain employers are required to provide unpaid, job-protected leave.
3. Family Medical Leave Act
 - a. Unpaid, legally required
 - b. Covered Employer: 50 or more employees during a 20-week period of the calendar year or the previous calendar year
 - i. This is the TOTAL number of employees, regardless of whether the employees are part-time, temporary, or seasonal.
 - ii. Once an employer meets the requirements of a Covered Employer, it is covered as long as it has 50 or more employees for at least 20 work weeks in the current or previous calendar year.
 - iii. Integrated Employer Test: Employers with common management, interrelation between operations, a centralized control of labor relations, and degree of common ownership/financial control will be treated as a single employer. This means that for FMLA purposes, the employees of all integrated employer entities must be counted to determine whether the employer is covered under FMLA.¹
 - c. Eligible Employee: worked for the employer for at least 12 months (need not be consecutive), for at least 1250 hours in the past year, and work at a location that employs at least 50 people within a 75-mile radius.
 - d. Requirements: eligible employees receive 12 weeks of leave in a 12-month period for:
 - i. Birth of child or placement of child with employee for adoption or foster child care, and to bond with newborn or newly-placed child;
 - ii. Care for spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;
 - iii. Serious health condition that makes employee unable to perform the essential functions of the job, including incapacity due to pregnancy and for prenatal medical care; or

¹ <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf> at pg. 11.

- iv. Any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or called to covered activity duty status.²
- e. How to count the 12 weeks:
 - i. Calendar Year
 - ii. Any fixed 12-month period (e.g., employee’s anniversary date, fiscal year)
 - iii. First date employee takes FMLA leave
 - iv. “Rolling” 12-month period
- f. Coordination with Other Leave:
 - i. FMLA is not required to be paid; however, employers may be more generous than the minimum requirement of the law and pay employees for some or all of FMLA leave.
 - ii. Employers may require other paid leave to run concurrently with FMLA.
 - iii. The standard should be applied uniformly to avoid a claim of unlawful discrimination. For example, if a female employee receives six weeks of paid FMLA leave to bond with her child, the employer should extend the same benefit to a male employee who is using FMLA to bond with a new child. Employers should be careful not to make assumptions about who is a primary caregiver, if the policy incorporates a distinction between primary/secondary caregiver.
- 4. Americans with Disabilities Act (“ADA”)
 - a. Covered Employers: employers with 15 or more employees.
 - b. Covered Employers must provide reasonable accommodations to employees with disabilities unless the employer can demonstrate that doing so creates an undue hardship to the employer or poses a direct threat to the safety of the employee or others in the workplace.

² <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/employerguide.pdf> at pg. 11

- i. Unpaid leave can be considered a “reasonable accommodation” consistent with the ADA’s purpose to require employers to change the way things are customarily done to enable employees with disabilities to work.³
- ii. If leave is required as a reasonable accommodation, the employer generally must welcome the employee back to the individual’s former position at the same rate of pay.
 - (A) However, if leaving the position open would cause an undue hardship, the employer must consider the employee for an open position for which the employee is qualified.

C. State Mandated Leave

- 1. Michigan Persons With Disabilities Civil Rights Act (“PWDCRA”)
 - a. Unpaid, mandated.
 - b. Applies to employers with one or more employees.
 - c. An employer may be obligated to provide unpaid leave where the employee has a disability that requires leave, the leave does not pose an undue hardship on the employer, ***and the employee in Michigan makes the request within at least 182 days of having reason to know of the need for an accommodation.***
 - d. Employers with fewer than 15 employees are generally not required to restructure a job or alter the schedule of employees as an accommodation under this Act.
- 2. Michigan Paid Medical Leave Act (“PMLA”)
 - a. Paid, mandated, accrued OR earned.
 - b. Employers with 50 or more employees must provide paid medical leave.
 - c. Eligible employees are non-exempt employees who worked an average of 25 hours per week in the previous calendar year.
 - i. Note: the statute is silent as to whether new employees are eligible when they have not worked in the prior calendar year. Many employers are providing paid medical leave to new employees who are expected to and actually do work an average of 25 hours per week.

³ MCL 1210(14). Furthermore, job restructuring only applies to an employee’s minor or infrequent duties relating to a particular job held by the person with a disability. MCL 37.1210(15).

- d. Structure for granting paid medical leave – two options
 - i. Accrual: Employees accrue paid medical leave at a rate of at least one hour of paid medical leave for every 35 hours worked. If the accrual method is chosen:
 - (A) The employer is not required to allow an employee to accrue more than one hour of paid medical leave in a calendar week.
 - (B) The employer must allow the employee to carry over up to 40 hours of unused accrued paid medical leave from one year to the next.
 - (C) The employer is not required to allow an employee to use more than 40 hours of paid family medical leave in a single benefit year.
 - ii. Lump Sum: Employees receive at least 40 hours of paid medical leave at the beginning of the benefit year. If the lump sum method is chosen:
 - (A) The employer may prorate the paid medical leave for employees hired in the middle of a benefit year.
 - (B) The employer is not required to allow employees to carry over any of the paid medical leave to another benefit year.
 - iii. Presumption of Compliance/Fill-In-The-Gap Policies:
 - (A) Employers are presumed to be compliant with the PMLA if they provide at least 40 hours of paid leave (regardless of whether the paid leave is classified as vacation, sick, paid time off, etc.) to all eligible employees.
 - (B) If a policy is partially compliant, employers can create narrow policies to “fill-in-the-gap” between the paid leave granted to eligible employees
 - iv. Use of Paid Medical Leave
 - (A) Employers are permitted to require an employer to wait until the 90th calendar day after commencing employment before using accrued paid medical leave.
 - (B) Leave must be used in one-hour increments unless a different policy is set forth in the handbook or employee benefit document.
 - (C) Employers may set notice, procedure, and documentation requirements; however, employee must be allowed at least 3 days to provide supporting documentation.

- (D) Leave may be used for any of the following:
- (1) Physical or mental illness, injury, or health condition of employee or family member;
 - (2) Medical diagnosis, care, or treatment of employee or family member;
 - (3) Closure of employee's primary workplace by order of public official due to public health emergency;
 - (4) Care of employee's child whose school or place of care has been closed by order of public official due to public health emergency;
 - (5) Employee or family member's exposure to a communicable disease that would jeopardize the health of others as determined by health authorities or a health care provider; and
 - (6) For care, counseling, victim services, relocation, and/or participation in a civil or criminal proceeding after domestic violence and sexual assault.

3. Crime Victim Leave

- a. Unpaid, mandatory
- b. Employees in Michigan who are victim to a crime are entitled to take an unpaid leave of absence to attend judicial proceedings related to a crime. Employers may not threaten to discharge or discipline – or actually discharge or discipline – an employee who is a victim subpoenaed by a prosecuting attorney to attend court for the purpose of giving testimony or if they are a victim's representative who attends or desires to attend court to be present during the testimony of the victim.
- c. Employees are considered a victim representative of a crime victim if they are:
 - i. The guardian or custodian of a deceased victim's child;
 - ii. The parent, custodian, or guardian of an assault victim under the age of 18; or
 - iii. Designated to act for an assault victim suffering from physical or emotional disabilities.
- d. This leave is different from PMLA, which may be used to attend civil or criminal proceedings arising out of domestic violence or sexual assault.

D. Other Common Types of Paid Time Off (“PTO”)

1. Note: these can be offered to employees as unpaid time off. Additionally, other states may require some of these leaves.
 - a. Vacation days
 - b. Personal time
 - c. Sick/medical leave
 - d. Holidays
 - e. Bereavement leave
 - f. Parental leave
 - g. Jury duty/witness leave
 - h. Caregiver leave
 - i. Voting time off
 - j. Paid leave for school activities

III. RECENT DEVELOPMENTS IN MICHIGAN AND FEDERAL LAW

A. Earned Sick Time Act (“ESTA”) v. Paid Medical Leave Act

1. ESTA was adopted by the legislature and subsequently amended in December 2018 by passage of the PMLA
 - a. Michigan Court of Claims held that the “adopt and amend” strategy was unconstitutional.
 - b. Michigan Court of Appeals reversed the Court of Claims ruling the amended version of the statute was valid and enforceable.
2. Oral Arguments heard before the Michigan Supreme Court on December 7, 2023
3. If the Court of Appeals decision is reversed:
 - a. ESTA will apply to employers with at least 1 employee
 - b. An additional category for use of leave will be added for meetings at a child’s school or place of care related to the child’s health or disability, or the effects of domestic violence on the child

- c. 1 hour of leave for every 30 hours worked – no cap on the amount earned; however, employers can cap the amount used at 72 hours
 - d. No more than 7 days’ advanced notice may be required
- B. Providing Urgent Maternal Protections for Nursing Mothers Act (“PUMP Act”)
 - 1. Effective December 29, 2023, with changes to the remedies effective April 28, 2023.
 - 2. Amends the Fair Labor Standards Act (“FLSA”) by expanding workplace protections for all new mothers, not just non-exempt employees (those eligible for overtime). Requires employers to provide all nursing employees with a private space (other than a restroom) and a reasonable amount of time to express breast milk for up to one year after a child’s birth.
 - a. Employers are not required to compensate the employees during these breaks as long as the employee is not performing any work.
 - b. If an employee is not completely off duty for the break’s entirety, the break is considered “hours worked,” and the worker must be compensated for such time.
 - 3. Employers with 50 or more employees must comply. Employers with fewer than 50 employees may be exempt if they can show that compliance would impose an undue hardship.
 - 4. Provides additional remedies for employees: An employer who violates an employee’s right to reasonable break time and space to pump breast milk are liable for legal and equitable remedies under FLSA
 - a. Remedies: recovering unpaid wages, reinstatement, front and back pay, compensatory damages, and liquidated damages.
 - b. Employees may choose to file a complaint with the Wage and Hour Division or a private cause of action seeking the appropriate remedies.
 - i. If employee chooses to file a private lawsuit, the employee must provide the employer with at least ten days to become compliant after the initial request for space.
- C. Pregnant Workers Fairness Act (“PWFA”)
 - 1. Signed into law on December 23, 2022. Effective June 27, 2023.
 - 2. Applies to public and private sector employees with 15 or more employees.
 - 3. Mirrors and expands protections contained in the ADA. Employers must make reasonable accommodations for employees with a known physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. In other words, unlike

under the ADA, the condition does not have to qualify as a “disability” in order to receive protections.

4. Remedies: lost income, “compensatory damages,” and punitive damages up to a statutory cap based on employer size.

IV. IMPACTS ON YOUR EXISTING LEAVE POLICIES

- A. Updates to your Handbooks
 1. Have you tripped the 50-employee wire?
 2. Do you have a policy that complies with the PWFA? With the PUMP Act?
- B. Do you need to create a sick leave policy/fill-in-the-gap policy or are you presumed compliant?

V. TRENDS OBSERVED IN PRACTICE

- A. Forbes Advisor published its 2024 statistics for paid leave in the United States:⁴
 1. 28 million Americans do not have any paid vacation or holidays
 2. 31% (almost one third) of US employees do not have access to PTO
 3. 52% of employees work even when using PTO
 4. Average Number of Days:
 - a. 11 paid vacation days
 - i. Private sector: 15 days after 5 years of service; 17 days after 10 years of service; 20 days after 20 years of service
 - b. 8 sick days
 - i. Generally, the longer an employee has been employed, the more sick days the employee has to use
 - ii. 8 days for full-time; 6 days for part-time
 - c. 7.6 paid holidays

⁴ <https://www.forbes.com/advisor/business/pto-statistics/>

- i. Even though there are 11 federal holidays, the national average is 7.6, with 21% of employees receiving only 6 holidays per year.
- 5. Parental Leave:
 - a. 2018 U.S. Bureau of Labor Statistics:
 - i. 17% of companies offered paid parental leave
 - ii. 89% offered unpaid parental leave
 - iii. New York is the most generous state with a program allowing parents to take up to 12 weeks of Paid Family Leave at 67% of their pay
- B. WTW 2023 Leave, Disability and Time-off Trends Survey⁵
 - 1. Employers choosing to modify paid leave, time off, or disability programs to support attraction and retention strategies
 - 2. Enhanced parental leave, bereavement leave, and caregiver leave.
 - 3. Unlimited leave: 12% have a policy, up from 9% two years ago. 16% anticipate offering unlimited PTO to exempt employees in the next two years
 - a. 31% of companies reporting this type of program for directors and executives; 9% considering it over the next two years
- C. Increase in use of “Paid Time Off” rather than separate vacation and sick leave policies.
- D. The rise and fall of unlimited leave policies
 - 1. Pros
 - a. PMLA – “presumed compliance”
 - b. no need for “separate buckets of leave”
 - c. reduces HR hours
 - d. Attractive benefit for top talent
 - 2. Cons

⁵ <https://www.wtwco.com/en-us/news/2024/01/majority-of-employers-will-change-their-leave-programs-in-the-next-two-years-wtw-survey-finds>

- a. Abuse?
 - i. Although statistics show that most employees do not abuse unlimited PTO, there are those that will
 - (A) This can put stress on the team
- b. Can encourage anxiety and burnout
 - i. Not all employees like the ambiguity of unlimited leave, especially your best employees - Employees will try to guess what the “real” number of hours for leave, which can result in taking less time than if there was an accrued model
 - ii. Hard working employees are less likely to take leave → causes burn out and they leave
- c. Not all managers will apply the policy equally
 - i. Some managers may be less willing to accept the unlimited PTO policies for their employees

E. Flex Time

1. This is often seen used as a four-day work week. Employers can also offer flex time to permit an employee to make up time taken for an appointment rather than requiring the employee to use PTO.
2. Flexibility in a job has become the primary driver for individuals switching from typical office hours to a flexible gig.⁶
 - a. 63% of individuals say that setting their own schedule makes gig work more attractive.
 - b. 44% of US respondents say they would consider leaving a full-time role for contingent work if it permitted a four-day workweek.
 - c. 53% of individuals who already made the switch attribute it to interest in flexibility and work/life balance.
3. Data indicates that employers are already moving in this direction.⁷

⁶ <https://www.forbes.com/sites/bryanrobinson/2024/02/06/new-flexible-jobs-making-a-2024-comeback-what-that-means-for-your-career/?sh=21490f9e3a39>

⁷ https://finance.yahoo.com/news/rise-little-flex-time-shorter-093000418.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAKYrrDE240L3XbJmWy

- a. In February 2023, Britain completed the world's largest trial of a four-day work week with a 92% success rate.
- b. Q4 of 2023 saw a 400% increase in jobs offering a 4-day workweek, 4.5-day week, or a 9-day fortnight compared to Q4 2022.

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